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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 346

UNION BANK & TRUST COMPANY, PETITIONER,

vs.

R. C. PHELPS, INDIVIDUALLY, AND AS TAX COLLECTOR OF MONTGOMERY COUNTY, ALABAMA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA AND BRIEF IN SUPPORT THEREOF.

WILLIAM B. WHITE,
Counsel for Petitioner.

JOHN S. COLEMAN,
Of Counsel.

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R. C. PHELPS, INDIVIDUALLY, AND AS TAX COLLECTOR OF MONTGOMERY COUNTY, ALABAMA, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Supreme Court of the United States:

The petitioner, Union Bank & Trust Company, respectfully states and shows to this Honorable Court:

Summary Statement of the Matter Involved.

The petitioner, a State bank organized under the laws of Alabama relating to banking institutions, was at all times herein referred to engaged in the business of banking in the city of Montgomery, Alabama. It brought this action at law in the Circuit Court of Montgomery County, Alabama, against R. C. Phelps, indi-

vidually, and as tax collector of Montgomery County, Alabama, to recover from him Twenty-five Hundred Twenty-one and 69/100 Dollars ($2,521.69), taxes and interest erroneously and illegally collected and exacted from petitioner and paid by it under protest, on account of an *ad valorem* tax assessment for state and county purposes against the shares of the capital stock of petitioner for the tax year beginning October 1, 1930, and ending September 30, 1931. The assessment was made as provided by Section 6 of the General Revenue Act of Alabama of 1923 (General Acts of Alabama of 1923, page 152, Section 6) (Appendix).

The action was in the form authorized in Alabama. *Ward* v. *First National Bank of Hartford,* 142 Southern 93, not yet officially reported.

The basis of the action as set out in the special counts of the complaint (R. 1-16) was:

(1) The State of Alabama had, by statute adopted in 1927 (General Acts of Alabama of 1927, page 139, Section 25), exempted from *ad valorem* taxation, or had left untaxed, shares of certain corporations engaged in actual and substantial competition with petitioner. A copy of the statute is set out in full in the appendix, the exemption provisions being as follows:

> "Every share of any domestic corporation (except banks or banking associations and building and loan associations, and mortgage companies or corporations making loans on real estate or purchasing mortgages or mortgage notes on real estate and industrial loan companies or corporations), shall be assessed and taxes thereon collected in the county wherein

such corporation has its home or chief office in the State, and shall be assessed at sixty per cent of its fair and reasonable market value to the person in whose name such shares stand on the books of the corporation and not to the corporation. * * * Provided, however, that the provisions of this act shall not apply to the shares of stock of domestic or foreign mortgage companies or corporations whose chief business is making loans on real estate or purchasing mortgages and mortgage notes on real estate; nor shall this act apply to the shares of domestic or foreign industrial loan companies or corporations, it being hereby expressly enacted that all shares of stock of such domestic and foreign mortgage companies or corporations and domestic and foreign industrial loan companies or corporations, shall be exempted from assessment and the payment of ad valorem taxes."

The State of Alabama had also exempted from taxation all mortgages, together with the notes, debts and credits secured thereby, on real and personal property situated in the State, provided such mortgages had been filed for record and the privilege tax paid thereon (Code of Alabama of 1923, Section 3022) (Appendix). The privilege tax referred to was at the rate of fifteen cents (15¢) per hundred dollars, or fraction thereof, of indebtedness secured by such mortgages (General Acts of Alabama of 1923, page 152, Section 4½).

By reason of the exemption of the shares of said corporations, and the exemption of said monied capital, competing with petitioner, Section 6 of the Revenue Act of 1923 imposing a tax on shares of national and State banks was void and unconstitutional in so far

as it applied to the shares of petitioner, because violative of the equality clause of the Fourteenth Amendment to the United States Constitution and of Section 217 of the Alabama Constitution, which provides that the property of private corporations, associations and individuals of the State shall forever be taxed at the same rate.

(2) Section 6 of the Revenue Act of 1923 was ineffective in so far as it attempted to tax shares of national banks located in Montgomery, Alabama, because other monied capital in the hands of individual citizens of the State coming into competition with such national banks within the meaning of Section 5219 Revised Statutes of the United States was expressly exempted from taxation or was untaxed. The Attorney General of Alabama had rendered an opinion to respondent that the shares of such national banks could not be taxed (R. 12-15) and no efforts or attempts were being made or were intended to be made to collect any tax on such shares, and said national banks were engaged in actual and substantial competition with petitioner; as the state had failed to levy any valid and legal tax on the shares of such national banks Section 6 of said statute was ineffective, discriminative and void in so far as it attempted to tax the shares of petitioner, because violative of Section 1 of the Fourteenth Amendment to the United States Constitution and of Section 217 of the Alabama Constitution.

(3) It had been judicially determined by the United States District Courts in Alabama that the shares of

national banks located in certain cities in Alabama, viz., Dothan, Selma and Troy, Alabama, could not be legally taxed under Section 6 of the 1923 statute, for the reason that monied capital in the hands of citizens of Alabama within the meaning of Section 5219 Revised Statutes of the United States in substantial and actual competition with the business of national banks located in said cities was untaxed or exempted from taxation and that the failure of the state effectively to tax national bank shares and the failure to tax, or the exemption from taxation of, shares of other corporations competing with petitioner and the exemption from taxation, or failure to tax, monied capital in competition with petitioner rendered ineffective and void the tax assessed under Section 6 of the 1923 Act against the shares of petitioner, because the assessment and statute were violative of Section 1 of the Fourteenth Amendment to the Federal Constitution and also Section 217 of the Alabama Constitution.

Petitioner's complaint also contained two common counts (R. 11). Under the Alabama practice, if petitioner was entitled to recover at all, it could recover under such counts, regardless of the sufficiency of the special counts. *Ward* v. *First National Bank of Hartford, supra.* The written protest filed by petitioner with respondent denied the validity of the assessment, or any part thereof, and also contained a denial of the right of the state and the county to make the assessment, and asserted that the collection of the tax was erroneously and illegally made and exacted (R. 16). Both the Circuit Court

and the Alabama Supreme Court apparently considered that the assessment was made under Section 6 of the 1923 Act. It was the position of petitioner that if there was any other statute under which the tax might have been claimed to have been levied, the tax and the assessment of same was illegal and void because of the exemption or failure to tax the shares of competing corporations which were in the same class as its shares, and because of the exemption from taxation, or the failure to tax, monied capital engaged in actual and substantial competition with petitioner.

Respondent, by way of answer, pled defenses (R. 22-23) which may be summarized as follows:

1. Not indebted in the form and manner alleged.

2. No appeal was taken from the assessment, and, as no protest was made until the taxes were paid, the protest was too late.

3. That the arrangement of national and state banks in one section as appeared in Section 6 of the 1923 Act was not a classification for taxation purposes but only a method of assessment. Respondent admitted that shares of certain national banks, presumably competing with petitioner, escaped share taxation, but this was because of the limitations placed by Congress upon the state's power to tax national bank shares. The failure of the state effectively to tax national bank shares did not relieve the petitioner from liability for the tax on its shares.

4. The Legislature had the right to select its subjects of taxation and to exempt such as it saw fit, and

the exemption of shares of stock of the corporations named in petitioner's complaint was not arbitrary but a legitimate prerogative of the state and did not violate any constitutional provision.

Upon the trial of the action all of the facts were agreed upon by the parties, and may be briefly summarized as follows:

Plaintiff, an Alabama corporation having its principal and only office in Montgomery, Alabama, was engaged in a general commercial and savings bank business. It accepted deposits, made loans, with real and personal property as security, and loans without security, and purchased and dealt in municipal and other bonds and securities (R. 28).

During the year 1930, and continuously thereafter, there were building and loan associations, mortgage corporations, industrial loan corporations, insurance companies and industrial banks located in Montgomery, Alabama, and elsewehere in the state, which loaned money and otherwise engaged in substantial and actual competition with petitioner, and with two national banks located in Montgomery, Alabama, the capital and shares of which were either wholly exempted from taxation, or were taxed at a lesser rate than the shares of petitioner and the shares of the national banks and during said time there were individuals, firms and partnerships who employed monied capital in the business of loaning money and otherwise engaging in substantial and actual competition with petitioner, and such monied capital was untaxed or taxed at a lesser rate than the shares of petitioner and the shares of the national banks (R. 31).

The national banks located in Montgomery, Alabama, were engaged in substantial and actual competition with petitioner (R. 33). A copy of the opinion of the Attorney General holding that these shares were not liable for *ad valorem* taxes was introduced (R. 12-15), and it was admitted no taxes had been collected on account of such shares during the tax year 1930-1931, and that no effort to collect same had been made, and that respondent did not intend to collect same (R. 34).

The decisions of the United States District Court in Alabama holding that the shares of national banks located in Dothan, Troy and Selma, Alabama, respectively, were not liable for *ad valorem* taxes had not been appealed from. The time had expired in two cases and no appeal was intended to be taken in any of the cases (R. 33).

Petitioner paid the taxes under duress and under protest and respondent had the amount so paid in his custody and possession (R. 15-20, 34).

On the trial in the Circuit Court judgment was rendered in favor of petitioner for the full amount sued for (R. 27). Respondent perfected an appeal to the Supreme Court of Alabama, which Court on May 19, 1932, reversed the judgment of the lower court and remanded the cause (R. 38). The decision was by a divided Bench, four of the Associate Justices concurring, and the Chief Justice and two Associate Justices dissenting. The opinion and dissenting opinion appear in the record at pages 39 to 56. The case has not yet been officially reported, but is reported in 142 Southern Reporter 552.

Petitioner, on June 1st, 1932, within the time allowed, filed an application for rehearing (R. 38). The application for rehearing was disallowed on June 16, 1932, and the former judgment of reversal and remandment was changed to a judgment reversing the judgment of the Circuit Court and rendering judgment together with costs in favor of respondent (R. 38).

Reasons Relied on for Allowance of the Writ.

1. This is a cause wherein a final judgment has been rendered or passed by the Supreme Court of Alabama, which is the highest court of the state in which a decision could be had, by which the validity of a statute of Alabama is drawn in question on the ground of its being repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States.

2. This is cause wherein a final judgment has been rendered or passed by the Supreme Court of Alabama, which is the highest court of the state in which a decision could be had, wherein a right or privilege is specially set up and claimed by the petitioner under the Fourteenth Amendment to the Constitution of the United States and the judgment erroneously denies the petitioner such right or privilege.

3. The Supreme Court of the State of Alabama, being the highest Court of said State in which a decision could be had, has decided a federal question of substance in a way probably not in accord with applicable decisions of this Court, including the cases of *Central State Bank* v. *Bennett,* 284 U. S. 239; *Cumberland Coal Company* v. *Board of Revision of Tax Assessments in Greene County, Pennsylvania,* 284 U.

S. 23; *Raymond* v. *Chicago Union Traction Company*, 207 U. S. 20; *Sioux City Bridge Company* v. *Dakota County*, 260 U. S. 441; *Sunday Lake Iron Company* v. *Township of Wakefield*, 247 U. S. 350; *First National Bank of Hartford* v. *Hartford*, 273 U. S. 548; *Minnesota* v. *First National Bank of St. Paul*, 273 U. S. 561; *Cummings* v. *Merchants National Bank*, 101 U. S. 151; *Carpenter* v. *Shaw*, 280 U. S. 363; *Montana National Bank* v. *Yellowstone County*, 276 U. S. 499; *Ward* v. *Love County*, 253 U. S. 17.

4. The decision and judgment of the Supreme Court of Alabama, being the highest Court of the State in which a decision in this cause could be had, denies to petitioner the equal protection of the laws, contrary to the Fourteenth Amendment to the Constitution of the United States, in that it denies to petitioner the right to have its shares of stock treated for the purposes of taxation on the same basis as shares of other corporations engaged in actual and substantial competition with petitioner.

5. The decision and judgment of the Supreme Court of Alabama, being the highest Court in the State in which a decision in this cause could be had, has denied to petitioner the equal protection of the laws, contrary to the Fourteenth Amendment to the Constitution of the United States, in that it erroneously denied to petitioner the right to be accorded the same privilege and treatment that is accorded to individuals, partnerships and corporations engaged in actual and substantial competiton with petitioner.

A certified copy of the entire record in this cause, including the record and proceedings and papers in the

Supreme Court of the State of Alabama, is herewith furnished and accompanies this petition, in compliance with Rule 38 of the rules of this Court; also a supporting brief of petitioner is hereto attached.

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of Alabama, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete description of the record and all the proceedings in the case numbered and entitled on its Docket 3, Division 12, R. C. Phelps, Individually and as Tax Collector of Montgomery County, Alabama, appellant, *v.* Union Bank & Trust Company, appellee, and that the same decree and judgment of the Supreme Court of Alabama may be reversed by this Honorable Court and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just. And your petitioner will ever pray.

UNION BANK & TRUST COMPANY,
By WILLIAM B. WHITE,
Counsel for Petitioner.

JOHN S. COLEMAN,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 346

UNION BANK & TRUST COMPANY, PETITIONER,

vs.

R. C. PHELPS, INDIVIDUALLY, AND AS TAX COLLECTOR OF MONTGOMERY COUNTY, ALABAMA, RESPONDENT

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of the Court Below.

The opinion of the Supreme Court of Alabama has not been officially reported, but is reported in 142 Southern Reporter 552, and appears in the record, beginning on page 39.

II.

Jurisdiction.

1. The jurisdiction of this court is sustained by Judicial Code, Section 237, as amended by the Act of February 13, 1925. 43 Stat. 938.

2. This case involves the validity of an assessment against and the collection of the tax upon the shares of stock of petitioner and the validity of the statute which authorized the assessment and collection of the tax (General Acts of Alabama of 1923, page 152, Section 6) (Appendix). The statute provided that every share of every incorporated bank or banking association incorporated under the laws of Alabama or any other state or of the United States should be assessed for taxation where the bank was located at the rate of 60% of its fair and reasonable market value. Each bank was required to make an annual return, furnishing information as to the value of its shares and certain other information for the purpose of assisting the officials in making the assessment. The value of the shares was fixed and, after deducting the value of the real and personal tangible property listed for taxation, sixty per cent of the residue value divided by the whole number of shares constituted the assessed value of each share. The bank was required to pay the tax of the shareholders.

The invalidity of the tax against the shares of petitioner came about by reason of the state exempting or failing to tax shares of building and loan associations, mortgage companies making loans on real estate or purchasing mortgages or mortgage notes on real estate, and industrial loan companies engaged in substantial and actual competition with petitioner (General Acts of Alabama of 1927, page 139, Section 25) (Appendix) and the exemption from taxation or the failure to tax monied capital of individuals, firms and corporations in substantial and actual competition with

petitioner (Code of Alabama of 1923, Section 3022) (Appendix) and by reason of the failure of the state to effectively and legally tax shares of national banks engaged in substantial and actual competition with petitioner. The opinion of the Supreme Court of Alabama recognized that the effort to tax shares of competing national banks was abortive (R. 40).

3. The date of the judgment sought to be reviewed is June 16, 1932 (R. 38).

4. There has been stated in the preceding petition under "Summary Statement of the Matter Involved," pages 1 to 6, and "Reasons Relied on for Allowance of the Writ," pages 9 and 10, the nature of the case and the rulings below, which were such as to bring the case within the jurisdictional provision relied on, and the same are hereby adopted and made a part of this brief.

Petitioner made the claim when it paid the tax to respondent (R. 16), also in its complaint filed in this cause (R. 5, 10), that the tax was levied, assessed and collected in violation of rights guaranteed to it under the Fourteenth Amendment to the Constitution of the United States. This claim was expressly considered and disallowed by the Supreme Court of Alabama (R. 41).

5. Cases believed to sustain the jurisdiction are *Central State Bank* v. *Bennett*, 284 U. S. 239; *Cumberland Coal Company* v. *Board of Revision of Tax Assessments in Greene County, Pennsylvania*, 284 U. S. 23; *Raymond* v. *Chicago Union Traction Company*, 207

U. S. 20; *Sioux City Bridge Company* v. *Dakota County,* 260 U. S. 441; *Sunday Lake Iron Company* v. *Wakefield Twp.,* 247 U. S. 350; *First National Bank of Hartford* v. *Hartford,* 273 U. S. 548; *Minnesota* v. *First National Bank of St. Paul,* 273 U. S. 561; *Cummings* v. *Merchants National Bank,* 101 U. S. 151; *Carpenter* v. *Shaw,* 280 U. S. 363; *Montana National Bank v. Yellowstone County,* 276 U. S. 499; *Ward* v. *Love County,* 253 U. S. 17.

III.

Statement of the Case.

This has already been stated in the preceding petition under "Summary Statement of the Matter Involved," pages 1 to 6, and in the statement of the facts set out in the petition, pages 7, 8 and 9, which are hereby adopted and made a part of this brief.

IV.

Assignments of Error Intended to be Urged.

The final decision and judgment of the Supreme Court of Alabama is erroneous in the following respects:

(*a*) It denies the petitioner the equal protection of the laws; contrary to the Fourteenth Amendment to the Constitution of the United States in, that, under the statutes of Alabama, shares of stock of corporations engaged in substantial and actual competition with petitioner are exempted from taxation, or are untaxed.

(*b*) It denies the petitioner the equal protection of the laws, contrary to the Fourteenth Amendment to the Constitution of the United States, in that under the statutes of Alabama monied capital in substantial and actual competition with petitioner is untaxed or expressly exempted from taxation.

(*c*) It denies the petitioner the equal protection of the laws, contrary to the Fourteenth Amendment to the Constitution of the United States, in that the State of Alabama has failed to levy a valid and legal tax on the shares of national banks engaged in substantial and actual competition with petitioner.

(*d*) In holding that there was no illegal or wrongful discrimination, contrary to the Fourteenth Amendment to the Constitution of the United States, by the State of Alabama in taxing shares of petitioner and exempting from taxation or failing to tax shares of corporations engaged in substantial and actual competition with petitioner.

(*e*) In holding that the taxing statutes of Alabama make no illegal discrimination, contrary to the Fourteenth Amendment to the Constitution of the United States, against petitioner.

(*f*) In holding that the State of Alabama could tax shares of petitioner and exempt from taxation or fail to tax shares of competing corporations and monied capital coming into competion with petitioner contrary to the equality clause of the Fourteenth Amendment to the Constitution of the United States.

(*g*) In holding that the taxes collected and exacted by respondent from petitioner were not illegally and erroneously collected under the statutes of Alabama contrary to the Fourteenth Amendment to the Constitution of the United States.

V.

Summary of Facts.

The material facts have been stated in the preceding petition, and are made a part of this brief (pages 7, 8 and 9).

There is no conflict in the facts, it being admitted that shares of building and loan associations, mortgage companies, industrial loan companies engaged in competition with petitioner are untaxed under the Alabama statutes and that monied capital of persons, firms and corporations competing with petitioner was untaxed. It was also shown that the Attorney General of Alabama had rendered an opinion to the effect that shares of national banks competing with petitioner were not liable for any tax. The Supreme Court of Alabama, in both the majority opinion (R. 40) and the minority opinion (R. 50) in this case, recognized the non-liability of the competing national banks in Montgomery, Alabama, for any tax on their shares.

Propositions of Law.

I.

A tax on shares of state banks and the exemption or failure to tax shares of competing national banks and

shares of other competing corporations and monied capital in competition with state banks denies to such banks the equal protection of the law, contrary to the equality clause of the Fourteenth Amendment to the United States Constitution:

Central State Bank v. *Bennett*, 284 U. S. 239;
Cumberland Coal Company v. *Board of Revision of Tax Assessments in Greene County, Pennsylvania*, 284, U. S. 23;
Raymond v. *Chicago Union Traction Company*, 207 U. S. 20;
Sioux City Bridge Company v. *Dakota County*, 260 U. S. 441;
Sunday Lake Iron Company v. *Wakefield Twp.*, 247 U. S. 350;
First National Bank of Hartford v. *Hartford*, 273 U. S. 548;
Minnesota v. *First National Bank of St. Paul*, 273 U. S. 561;
Cummings v. *Merchants National Bank*, 101 U. S. 151;
Carpenter v. *Shaw*, 280 U. S. 363;
Montana National Bank v. *Yellowstone County*, 276 U. S. 499;
Ward v. *Love County*, 253 U. S. 17;
F. S. Royster Guano Company v. *Virginia*, 253 U. S. 412;
Louisville Gas & Electric Company v. *Coleman*, 277 U. S. 32;
Airway Electric Appliance Corporation v. *Day*, 266 U. S. 71;
Schlesinger v. *Wisconsin*, 270 U. S. 230;

Quaker City Cab Company v. *Pennsylvania,* 277 U. S. 389;
Munn v. *Des Moines National Bank,* 18 Federal, Second Series 269.

II.

Shares of national and state banks are the same species of property for taxation purposes, and no discrimination can be made in favor of one and against the other. See cases cited under Proposition I above, and also the following state cases:

State Bank v. *Board of Review,* 91 Alabama 217;
Central National Bank v. *Sutherland,* 113 Neb. 126;
State Bank v. *Endres,* 109 Neb. 753;
Voran v. *Wright,* 129 Kansas 601;
Commercial State Bank v. *Wilson,* 53 South Dakota 82;
State v. *Mady,* 83 Montana 418;
Security Savings Bank v. *Board of Review,* 189 Iowa 463.

ARGUMENT.

In the case of *Central State Bank* v. *Bennett,* 284 U. S. 239, it was held that where state officials had collected taxes on state bank shares at a higher rate than was collected on other property of the same class, contrary to the Fourteenth Amendment, such taxes, to the extent that they were in excess of the rate collected on the other property, could be recovered by the complaining banks. In the opinion delivered by Mr. Justice Brandeis, it was stated:

> "It is assumed that there was such inequality of treatment as the Constitution prohibits."

Petitioner construes the opinion as a holding by this Court that there was a wrongful discrimination in contravention of the Fourteenth Amendment, as otherwise a refund of the excess taxes collected would not have been directed.

The only distinction in the case at Bar from the Central State Bank case seems to be that in the latter case the property of competitors was taxed at a lesser rate than were the shares of stock of the complaining State banks, whereas in the present case the property of the competitors with petitioner is not taxed at all. The distinction is one of degree of inequality and not one of principle. The discrimination is more unjust here because of the total exemption from taxation of the property of petitioner's competitors.

The Supreme Court of Alabama, in *State Bank* v. *Board of Review,* 91 Alabama 217, considered a State statute which allowed shareholders in national banks to deduct their indebtedness from the value of their shares in arriving at taxable values and accorded no similar privilege to shareholders in State banks. The statute was held discriminatory, and violative of the uniformity provisions of the Alabama Constitution. These uniformity provisions in the State Constitution as in the constitutions of other States from which authorities are cited are obviously closely analogous in purpose to the purpose and intent of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. We quote from the opinion of the Court as follows:

"What we do decide is, that whenever the legislature levies a tax on property, the rate must be in exact proportion to the value of such property; and that if a tax is imposed on any species of property, all property belonging to that species must be taxed at the same rate, whether it belongs to an individual, an association of persons, or to a private corporation. We mean by this, not only that, in this regard, natural persons, individuals or companies stand on the same footing with private corporations, but also that each individual association, or private corporation, is, under our constitution, endowed with the same rights, and subject to the same burdens, as are enjoyed or suffered by every other natural person, association of persons, or private corporation.

"We need scarcely say that bank shares in a National bank, and bank shares in a State bank, belong to one species of moneyed capital. Any attempt to draw a distinction between them, as subjects of taxation, would be futile. In assessing the one, our statute allows a deduction of the taxpayer's indebtedness, and taxes the surplus. In assessing the other, it allows no such deduction. We hold that this is a violation of Section 6, Art. XI of Alabama's Constitution, and that the shareholders in State banks are entitled to the same deductions as the statute accords to the shareholders of National banks."

In the case at bar the Chief Justice and two Associate Justices who dissented from the majority were of the opinion that the holding in the State bank case controlled here, and that such holding should not be departed from (R. 52).

There, of course, may be discrimination violative of the equality and uniformity clauses of the State Constitution which does not offend the Fourteenth Amendment. However, it is respectfully submitted that upon comparing the facts in the State bank case, *supra*, with those here, the considerations which influenced the State court in declaring that State and national bank shares belong to one species of moneyed capital within the meaning of the State Constitution equally impel the conclusion that the shares of both State and national banks constitute one class of property within the meaning of the Fourteenth Amendment and that no discrimination can legally be made in favor of one and against the other. The reasoning and the substance of the holding in the majority opinion is contained in the following excerpts from the opinion:

> "Therefore, when the Legislature, in the exercise of the power delegated by the Federal statute efficaciously levies a tax on the stock of United States Banks, in conformity with the statute, such levy reflects the limitation embodied in the Constitution in respect to the levy on subjects of taxation within the inherent power of the State, and requires substantial uniformity. Such was the case dealt with in *State Bank* v. *Board of Revenue*, 91 Ala. 217.
>
> "But where, as in the case at bar, the attempted exercise of the delegated power of taxation under the Federal statute is abortive, there is no basis for applying the limitation embodied in Section 217 of the Constitution to taxes levied in the exercise of the State's inherent power on domestic bank stock; therefore, the plaintiff was not entitled to recover" (R. 40).

> "Like reasoning as outlined in this opinion leads to the conclusion that the State system of taxation here questioned violates no provision of the Fourteenth Amendment to the Constitution of the United States. *Ohio Oil Co.* v. *Conway*, 281 U. S. 146" (R. 41).

The distinction sought to be made by the majority of the court below was that where the State efficaciously levies a tax on national bank shares such levy reflects the limitations embodied in the State and Federal Constitutions and substantial uniformity is required but where the attempted exercise of the power is abortive there is no basis for applying the State or Federal Constitutional limitations and the tax does not fall as to State bank shares, although it is ineffective as to national bank shares (R. 40).

The effect of the majority opinion can only be this: If national bank shares are taxed at all, then, no matter how small the tax, State bank shares must be taxed on the same basis, because in that event shares of both institutions constitute one inseparable species for taxation purposes. But the majority in the case at Bar also say that the Legislature not having levied even a small tax on other moneyed capital, the tax falls as to national bank shares but stands as to State bank shares. This can only mean that the Legislature by its action in levying or not levying a tax on other moneyed capital can determine and decide when State and national bank shares are one and the same species of taxable property. It is earnestly submitted that such a result cannot be sound or sustained on any tenable ground. Shares of national and State banks are

or are not one and the same species, regardless of what action the Legislature may take with reference to the taxation of other forms of moneyed capital. The question of constitutional power to classify subjects of taxation is one that the Legislature cannot decide. If the shares of State and national banks are one species of taxable property within the meaning of the Fourteenth Amendment under any circumstance, they constitute the same species under all circumstances.

It is stated in the majority opinion that the power to tax stocks in banks of the United States is not an inherent power residing in the State but a power delegated by Congress (R. 39).

It is too well established to admit of argument at this stage that the Federal and not the State government is the government exercising limited, enumerated or delegated powers. The Tenth Amendment to the Federal Constitution was passed to put that question beyond any doubt.

Congress, therefore, as we conceive the situation, did not *delegate* the power to tax shares of national banks in the hands of individual citizens of the States, but merely consented to the withdrawal of any objection on the part of the government of the United States to the exercise of the power to tax such shares already inherent in the States, provided uniformity in taxation be preserved, finding by such consent that as a matter of fact if uniformity is so preserved no improper burden will be imposed upon the Federal agencies, the national banks.

Mr. Justice Van Devanter, in *First National Bank* v.

Anderson, 269 U. S. 341, 347, said, with reference to the power of the States to tax national bank shares:

> "National banks are not merely private moneyed institutions but agencies of the United States created under its laws to promote its fiscal policies; and hence the banks, their property, and their shares cannot be taxed under State authority except as Congress consents and then only in conformity with the restrictions attached to its consent. * * *"

The exact form of expression used by Mr. Justice Swayne in *Farmers & Merchants National Bank* v. *Dearing,* 91 U. S. 29, is:

> "* * * In the complex system of polity which obtains in this country, the powers of government may be divided in four classes:
>
> "Those which belong exclusively to the States;
>
> "Those which belong exclusively to the National Government;
>
> "Those which may be exercised concurrently and independently by both;
>
> "And those which may be exercised by the States, but only with the consent, express or implied, of Congress.
>
> "Whenever the will of the nation intervenes exclusively in this class of cases, the authority of the State retires and lies in abeyance until a proper occasion for its exercise shall recur. *Gilman* v. *Philadelphia,* 3 Wall. 713 (70 U. S. XVIII. 96); *Ex parte McNiel,* 13 Wall. 240 (80 U. S. XX, 625).
>
> "The power of the States to tax the existing national banks lies within the category last mentioned."

Other cases dealing with the power of the States to tax Federal agencies are *Union Pacific Railroad Company* v. *Peniston*, 18 Wall. 5, and *Thomson* v. *Union Pacific Railroad Company*, 9 Wall. 579.

It is respectfully submitted that the majority opinion of the court below is erroneous in holding that where a State taxes shares of national banks it does so under power delegated by Congress and not by virtue of the sovereign power inherent in the State.

It was contended on the hearing in the Supreme Court of Alabama that if the State in taxing State banks had to conform to the same system that it was required to follow with reference to national banks this would destroy the State's power of classification. This contention is forcibly answered by the opinion delivered by Chief Justice Callaway, of the Supreme Court of Montana, in *State* v. *Mady*, 83 Montana 418, as follows:

> "It is argued that by thus restricting the taxation of national bank shares Congress has restricted, and may destroy, the State's power to classify property for the purposes of taxation. In one view this is a potent argument, but upon mature consideration we do not think it controlling. That Congress may not interfere with the taxation of property which it is the exclusive right of the State to tax will not be questioned. The difficulty here arises chiefly upon the requirements of the State Constitution. It requires the taxation of all property not exempt, and that the tax must be uniform upon the same class of subjects. The congressional requirement we are considering is not incon-

sistent with our constitutional provision requiring uniformity. It is thus our own fundamental law, acting coordinately with the law of Congress, which compels the State to tax State as well as national bank shares upon the same basis. The classification law placing national bank stock in class 6 and money coming into competition with the business of national banks in class 5 contravenes the provisions of section 5219. To that extent the classification law was and is invalid; it is not lawful to tax national bank stock on the 40 per cent basis. Conceding that it is proper under the law to tax it on the 7 per cent basis, we find the law attempting to tax the State bank stock on the 40 per cent basis—property of exactly the same kind—a clear violation of the constitutional unformity requirement. The State does not abrogate any part of its taxing power because it yields to Congress with respect to the taxation of a species of property which it could not tax without the consent of Congress, when its own fundamental law compels it to tax similar property upon the same basis on which it taxes property subject to the restrictions of Congress."

Other State Supreme Courts have held to the same effect in the following cases:

State Bank v. *Board of Review, supra;*

State Bank v. *Endres,* 109 Neb. 753;

Central National Bank v. *Sutherland,* 113 Neb. 126;

Voran v. *Wright,* 129 Kansas 601;

Commercial State Bank v. *Wilson,* 53 South Dakota 82;

Security Savings Bank v. *Board of Review,* 189 Iowa 463.

See also *Munn* v. *Des Moines National Bank,* 18 Federal, Second Series, 269.

There can be no question but that there was discrimination by the State of Alabama in taxing the shares of petitioner and exempting or failing to tax the shares of competing national banks and shares of other competing corporations and monied capital engaged in substantial and actual competition with petitioner. Both the majority and minority opinions of the court below recognize that there is no semblance of justice in taxing the shares of State banks and excluding those of national banks. The sole question involved in this case is whether such discrimination is of the character prohibited by the Fourteenth Amendment. Under the rulings of this Court it is believed petitioner is denied rights guaranteed to it by the Fourteenth Amendment.

Mr. Justice McReynolds, in the opinion in *Sunday Lake Iron Company* v. *Township of Wakefield,* 247 U. S. 350, said:

> "The purpose of the equal protection clause of the 14th Amendment is to secure every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents."

Other cases decided by this Court which the petitioner deems as holding that the discrimination in this

case is of the character prohibited by the Fourteenth Amendment are cited under the first proposition of the heading "Propositions of Law," and we respectfully refer the court to those cases.

The majority opinion of the court below cites *Ohio Oil Company* v. *Conway,* 281 U. S. 146, as authority that petitioner's rights under the Fourteenth Amendment were not violated. In that case this Court considered a statute adopted by the State of Louisiana imposing a graduated excise severance tax on oils. Varying amounts of taxes were levied according to the gravity of each kind of oil, but as all oils of the same gravity were taxed alike, it was held that the statute did not violate the Fourteenth Amendment. We fail to perceive wherein that ruling militates in any way against petitioner's claim in the present case. The controlling principles in the case were clearly defined by Mr. Chief Justice Hughes, who delivered the opinion. We quote from the opinion as follows:

> "With all this freedom of action, there is a point beyond which the state can not go without violating the equal protection clause. The state may classify broadly the subjects of taxation, but in doing so it must proceed upon a rational basis. The state is not at liberty to resort to a classification that is palpably arbitrary. The rule is generally stated to be that the classification 'must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' "

The Federal question involved in this case is of importance to petitioner and to numerous other State banks in Alabama similarly situated. The question is also of importance, we think, to the State of Alabama.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers in order that the error committed by the Supreme Court of Alabama in rendering its decision and judgment may be corrected and that petitioner may have the benefit of the rights to which it is entitled under the laws and Constitution of the United States and that to such end a writ of certiorari should be granted and this Court should review the decision of the Supreme Court of Alabama and finally reverse it.

Respectfully submitted,

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Of Counsel for Petitioner.

APPENDIX.

The following are the Statutes of Alabama so far as material to this case:

General Acts of Alabama of 1923, p. 152, Sec. 6.

"*Taxation of Incorporated Banks.*—Every share of any incorporated bank or banking association incorporated under the laws of this State, or any other state, or of the United States, shall be assessed for taxation in the county, and in the city or town where such bank is located at sixty per cent of its fair and reasonable market value. For the purpose of determining the value of such shares, the president or managing officer of such bank, or banking association, shall make out and return under oath to the assessor of the county in which such bank is located, and to the State Tax Commission, a list showing the total number of shares of capital of such bank, the name and address of every shareholder, as far as known, the fair and reasonable market value of such shares and the par value thereof, what sales of stock have been made during the last twelve months, with the names of the sellers and buyers thereof, and the price paid for same, the annual dividends declared upon the stock for the last three years, the value of the shares as shown by the books of the bank by the last report of the officers to the shareholders, the amount of the surplus, and the amount of the undivided profits not included in the surplus, and such president or managing officer shall at the same time in the manner required by law, return to the assessor a statement of all real estate and improvements thereon, and furniture and fixtures, owned by the bank situ-

ated in this State and liable for taxation. The value of the shares of such bank for taxation shall be fixed by the Board of Review and said Board of Review in fixing such value shall deduct from the total of the shares the reasonable market value, of the real estate and improvements thereon, and the furniture and fixtures belonging to such bank and assessed for taxation, and sixty per cent of the residue after such deduction shall be the assessed value of such shares, and such residue divided by the whole number of shares, shall constitute the assessed value of each share for taxation. It is the intent and meaning of this section that the real estate of every bank shall be assessed against the bank as other real estate in this State is assessed to the owner thereof, and that such bank shall pay the taxes thereon, and that the shares shall be assessed for taxation against the shareholders at sixty per cent of their fair and reasonable market value, as above determined after deducting therefrom the reasonable market value of the real estate and improvements thereon, and furniture and fixtures of the bank and that the bank shall pay for the shareholders respectively the tax so assessed, against their shares. In arriving at the fair and reasonable market value of the shares, there must be considered everything which gives them value, such as franchise, capital and assets of the bank, the real and personal property, the reserve fund and surplus, the undivided profits not included in the surplus, and all other interests of the shareholders that would pass to a purchaser on a transfer of his stock, and except as herein expressly provided, no separate tax shall be levied upon these elements, of value or any of them. It shall be no ground

of objection to such assessment of shares that it is entered upon the assessment book in the corporate name of the bank."

General Acts of Alabama of 1923, p. 152, Sec. 7.

"*Reports Required of Banks.*—The reports required from banks by the preceding sections shall be made on blanks furnished by the State Tax Commission. The failure of any banks to make the report required herein for the assessment for ad valorem taxation by December 31st of the year for which the tax is to be assessed shall subject such bank to a penalty of five dollars per day for each day's delinquency, which penalty may be collected by suit in the name of the State in any court of competent jurisdiction in Montgomery county, Alabama."

General Acts of Alabama of 1923, p. 152, Sec. 5.

"*Taxation of Unincorporated Banks.*—Any unincorporated bank, private bank or institution doing a banking business that is not incorporated shall be assessed at sixty per cent of its fair and reasonable market value. For the purpose of aiding in determining the amount of such assessment, the owner, president, cashier or manager of such bank shall under oath file with the tax assessor a statement in duplicate, one of which shall be forwarded to the State Tax Commission at Montgomery, Alabama, showing the capital of such bank, its surplus, undivided profits not included in the surplus, and all real estate owned by said bank and situated in this State, with a description of the same and the value of such real estate and the name of the person or the names of the persons who own said

bank, what interest or interests in said bank have been sold during the past twelve months, the price of the same, the name of the sellers, and the purchasers, the annual dividends declared by such bank for the last three years and the amount of the capital, surplus and undivided profits not included in the surplus. The Board of Review or State Tax Commission may examine any person with reference to the matters mentioned in said affidavit, and from all sources of information herein provided for, and from all other information that may be obtained, the Board of Review shall determine the amount of such capital, surplus, undivided profits not included in the surplus, and the value of the real estate of such bank. From the amount of the sum of the capital, surplus and undivided profits not included in the surplus so determined, the Board of Review shall deduct the value of the real estate of said bank. The bank shall pay a tax on the real estate and on the residue of all of its capital as above determined."

General Acts of Alabama of 1927, p. 139, Sec. 25.

"*Taxation of Domestic Corporations Except Banks and Building and Loan Associations.*— Every share of any domestic corporation (except banks or banking associations and building and loan associations, and mortgage companies or corporations making loans on real estate or purchasing mortgages or mortgage notes on real estate and industrial loan companies or corporations), shall be assessed and the taxes thereon collected in the county wherein such corporation has its home or chief office in the State, and shall be assessed at sixty per cent of its fair and reasonable market value to the person

in whose name such shares stand on the books of the corporation and not to the corporation. The President or managing officer of every such corporation shall make out and return under oath to the tax assessor and to the State Tax Commission a list showing the total number of shares of capital stock of such corporation and the par value thereof, and the full name and residence of each stockholder, as far as known, the actual value thereof, the date of the last sale of shares of stock of such corporation, with the name of the seller and the purchaser and the price paid for the same, and the annual dividend declared on the stock of such corporation, for the last three years, and the value of the shares as shown by the books of the corporation, and by the last report of the officers to the shareholders, and the amount of the surplus, and the amount of the undivided profits not included in the surplus, and such other information as may be required by the State Tax Commission. There shall be attached to the copy of the return made to the State Tax Commission a balance sheet showing the condition of such corporation at the close of its fiscal period next preceding October first of the year for which the assessment is to be made. Such corporations shall at the same time make a tax return sworn to by its president or manager, to the State Tax Commission and to the County Tax Assessor, on a form prescribed by the State Tax Commission, of all taxable property, real and personal, situated in the State and owned by such corporation, and the State Tax Commission after passing on the value of the shares of the capital stock, shall deduct from the total value of such shares the reasonable market value of the real and per-

sonal property of the corporation, as shown to be by such tax return of the corporation, and sixty per cent of the residue of value remaining after such deduction shall be the assessed value of the whole of such shares, and such sixty per cent of the residue divided by the whole number of shares, shall constitute the value of each share for taxation. Provided, however, that if any property owned by a corporation, which property is subject to taxation in this State, is omitted from the tax return filed by the corporation, the same shall be assessed as an escape item or items of taxation in the same manner as escaped property of individuals is assessed and the value of such omitted property shall not be deducted from the value of the shares of stock of the corporation as assessed for taxation. The corporation shall pay for the shareholders the tax assessed against his shares, and the amount so paid for any shareholder shall be a lien on any interest which such shareholder may have in any property owned by the corporation. In arriving at the value of the shares of the stock of a corporation organized under the laws of Alabama for the purpose of conducting an insurance business, there shall be deducted from the value of such shares, in addition to the assessed value of its property, (the amount of its bonds of the State of Alabama, or bonds of any county or municipality thereof, and of the United States), held by such insurance corporation at the time of such assessment, which said bonds were held during all the six months preceding such assessment. If the aggregate value of shares does not exceed the aggregate value of the real and personal property of the corporation as returned for taxation, then no tax shall

be demanded or collected on the shares, and no other deduction shall be made from the aggregate amount or sum at which the real and personal property of the corporation is returned for taxation than is herein specifically provided for. Provided that any corporation within the provisions of this section shall be entitled, for the purpose of arriving at the value of shares for taxation, to have deducted from the value of its shares, as fixed by the State Tax Commission, the assessed value of property owned by such corporation in other states or in other counties of this State on the next preceding first of October. The State Tax Commission and the tax assessor shall have a right to demand and receive of said corporation a certified copy of the assessment of any property outside of the State of Alabama sought to be deducted as above provided. The State Tax Commission shall deliver said assessment to the tax assessor with its other assessments of property in the county and notice of such assessment shall be given as in other cases. It shall be no ground for objection to such assessment of shares that the same is entered upon the assessment books in the name of the corporation. Provided that no shareholder of any corporation which pays a tax on its franchise or intangible property shall be liable for the taxes specified in this section as to the same property. Provided, however, that the provisions of this Act, shall not apply to the shares of stock of domestic or foreign mortgage companies or corporations whose chief business is making loans on real estate, or purchasing mortgages and mortgage notes on real estate; nor shall this Act apply to the shares of domestic or foreign industrial loan companies or corpo-

rations, it being hereby expressly enacted that all shares of stock of such domestic and foreign mortgage companies or corporations and domestic and foreign industrial loan companies or corporations, shall be exempted from assessment and the payment of ad valorem taxes."

General Acts of Alabama of 1923, p. 152, Sec. 9.

"*Reports required on blanks furnished by State Tax Commission; penalty for failure to report.*—The reports required from corporations by the preceding sections shall be made on blanks furnished by the State Tax Commission. The failure of corporations to make reports required herein for the assessment for ad valorem taxation, by December 31st of the year for which the tax is to be assessed shall subject such corporation to a penalty of five dollars per day for each day's delinquency, which penalty may be collected by suit in the name of the State in any court of competent jurisdiction in Montgomery County, Alabama."

General Acts of Alabama of 1919, p. 282, Sec. 13.

"*State Tax Commission to furnish blanks; how paid for.*—That all blanks covering the assessment of corporations shall be furnished by the State Tax Commission, the payment for such blanks to be paid out of the general appropriation for public printing."

General Acts of Alabama of 1919, p. 282, Sec. 14.

"*List of shareholders not required if corporation agrees to pay tax for such shareholders.*—If a corporation or a bank by endorse-

ment on its tax assessment or otherwise in writing, shall agree to pay the taxes, if any, assessed on the shares for the shareholders, it need not file a list of such shareholders."

Section 3022 of the Code of Alabama of 1923.

"*Property and persons exempt.*—The following property and persons shall be exempt from ad valorem taxation and none other: (1) * * * all mortgages, together with the notes, debts, and credits secured thereby on real and personal property situated in this State, which mortgages have been filed for record and the privilege tax paid thereon; all money on deposit in any bank or banking institution in this State and all other solvent credits; * * *"